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**Subject:**

Activity in Case 1:18-cv-05775-ERK-TAM Star Auto Sales of  
Bayside, Inc. et al v. Voynow, Bayard, Whyte and Company, LLP  
et al Order on Motion for Discovery

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U.S. District Court

Eastern District of New York

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**Case Name:** Star Auto Sales of Bayside, Inc. et al v. Voynow, Bayard, Whyte and Company, LLP et al

**Case Number:** 1:18-cv-05775-ERK-TAM <[https://ecf.nyed.uscourts.gov/ ...](https://ecf.nyed.uscourts.gov/...)>

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### Docket Text:

**Minute Entry and Order:** A telephonic status conference was held on 12/13/2023 before Magistrate Judge Taryn A. Merkl. Appearances by Jamie Scott Felsen, Joseph M. Labuda, and Jeremy Michael Koufakis for Plaintiffs, and Maureen Fitzgerald for Defendants. Discussion held regarding case status and open discovery issues from the 6/7/2023 Motion for Discovery (ECF No. [102]) and the 8/21/2023 Motion to Quash and Motion for Protective Order (ECF No. [108]), as reported by the parties in their 9/7/2023 joint status report (ECF No. [109]). As stated on the record, Plaintiffs' four requests and two motions are denied, in part.

Plaintiff's demand number nine (ECF No. 102, at 2-3) for additional samples of engagement letters for tax and review engagements is denied for the reasons stated on the record, including the finding that, in light of the discovery already produced by Defendants, further discovery on this issue is not proportional to the needs of the case. Denial of the motion is also warranted because the motion fails to include a certification that the parties conferred appropriately in an attempt to resolve this issue without judicial intervention. Indeed, Plaintiffs' counsel confirmed on the record that they had not previously discussed with defense counsel their request for the provision of records related to Defendants' engagements with the two specific entities discussed today (Kerdeck and Peruzzi Auto Groups). EDNY Local Rule 37.3(a) requires parties to "attempt to confer in good faith in person or by telephone in an effort to resolve the dispute, in conformity with Fed. R. Civ. P. 37(a)(1)." For these two reasons, Plaintiffs'

request for further discovery on this issue is denied.

Plaintiffs' demand number six (ECF No. 102, at 4-5) for a blank checklist for a review engagement is denied in part. Despite extensive discussion, the record is not completely clear whether Defendant Voynow uses a publicly available review engagement checklist or a custom review engagement checklist. The parties are directed to meet and confer to get a definitive answer to this question and resolve the dispute, either with a limited verified interrogatory, a declaration, or some other means, no later than 1/5/2024, the deadline for all discovery.

Plaintiffs' motion to quash subpoena (ECF No. 108, at 1-4) is denied. As discussed on the record, on August 2, 2023, the Court granted Plaintiffs' motion for an extension of all discovery, and unequivocally extended the fact discovery deadline specifically to August 31, 2023, in light of myriad discovery disputes in the case and in the absence of a certification of the close of fact discovery from the parties. Defendants' subpoena was issued before that date and Defendants have demonstrated that the requested documents could bear on their defenses as further explicated on the record.

Plaintiffs' motion to preclude (ECF No. 108, at 4-6) is denied, without prejudice to raise argument regarding the challenged documents in a motion in limine. As noted, fact discovery was open through 8/31/2023 (see 8/2/2023 ECF Order), and the parties did not certify the close of fact discovery until 9/7/2023 (see ECF No. 109 at 1). Accordingly, Defendants' document production of June 30, 2023, was timely and Plaintiffs had more than enough time to make additional discovery requests related to this production prior to the close of fact discovery.

The remaining deadlines for the completion of discovery remain in effect. Expert depositions shall be completed by 12/15/2023. All discovery shall be completed by 1/5/2024, and the parties shall submit a joint status report certifying the close of all discovery by 1/12/2024. The last date to take the first step in dispositive motion practice, in accordance with the Individual Rules of the assigned District Judge, shall be 2/12/2024. In the absence of dispositive motions, the Joint Pretrial Order shall be filed by 3/12/2024; the JPTO must be prepared in strict compliance with the rules of the assigned District Judge. Ordered by Magistrate Judge Taryn A. Merkl on 12/13/2023. (AT&T Log #11:30-12:50.) (ALG)

1:18-cv-05775-ERK-TAM Notice has been electronically mailed to:

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
STAR AUTO SALES OF : 18-cv-05775-ERK-TAM  
BAYSIDE, INC., et al., :  
 :  
 :  
 : Plaintiffs, :  
 :  
 :  
 : - versus - : U.S. Courthouse  
 : Brooklyn, New York  
 :  
 : VOYNOW, BAYARD, WHYTE AND :  
 : COMPANY, LLP, et al., :  
 :  
 : December 13, 2023  
 : Defendants : 11:30 a.m.  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE TARYN A. MERKL  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**  
**(VIA VIDEO/AUDIO)**

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1 THE CLERK: ...Cause for a Status Conference,  
2 docket 18-cv-5775, *Star Auto Sales of Bayside, Inc., et*  
3 *al. v. Voynow, Bayard, Whyte and Company, LLP, et al.*

4 Before asking the parties to state their  
5 appearance, I would like to note the following.

6 Persons granted remote access to proceedings  
7 are reminded of the general prohibition against  
8 photographing, recording, and re-broadcasting of court  
9 proceedings. Violation of these prohibitions may result  
10 in sanctions including removal of court-issued media  
11 credentials, restricted entry to future hearings, denial  
12 of entry to future hearings, or any other sanctions  
13 deemed necessary by the Court.

14 Will the parties please state their appearances  
15 for the record starting with the plaintiff?

16 MR. FELSEN: Good morning, your Honor. This is  
17 Jamie Felsen. I'm joined here with Joseph Labuda and  
18 Jeremy Koufakis.

19 MS. FITZGERALD: Good morning, your Honor.  
20 This is Maureen Fitzgerald on behalf of the defendants.

21 THE COURT: All right. So good morning,  
22 everybody. We are here at long last hopefully on a final  
23 last-ditch effort to resolve some of these discovery  
24 disputes.

25 So I'm just curious to start, you know, kind of

Proceedings

1 where things stand with regard to what remains  
2 outstanding in terms of the fact discovery. And I know  
3 you're in the midst of expert practice as well. Rebuttal  
4 expert reports were due November 10th.

5 So would you like to start by providing an  
6 overview, Mr. Felsen?

7 MR. FELSEN: Sure, your Honor. I'm happy to  
8 report that we will be as of Monday finished with the  
9 expert depositions. As far as we're concerned, fact  
10 discovery has been closed but for the four issues that  
11 we're here to discuss today that are outlined in the  
12 letter that we submitted.

13 THE COURT: Okay. So the last expert  
14 deposition is Monday?

15 MR. FELSEN: Correct.

16 THE COURT: Okay. And so the four matters that  
17 were outlined in your letter of September 7th on document  
18 109, those are the only four issues that remain in your  
19 point of view?

20 MR. FELSEN: Yes. It essentially boils down to  
21 two issues in document number 108, and then there's two  
22 issues in document number 102 on the docket.

23 THE COURT: Yes, that's what we gleaned from  
24 following all of the connections between the documents.

25 Ms. Fitzgerald, can you give me an update from

Proceedings

1 defendant's perspective?

2 MS. FITZGERALD: Well, I mean we largely agree.  
3 We have the last expert deposition scheduled for Monday.  
4 And there's four open issues between the docket filing  
5 102 and docket filing 108 that the parties are prepared  
6 to address today with your Honor.

7 THE COURT: Great. Just trying to make sure  
8 we're all on the same page in terms of the order of the  
9 agenda and what we're on deck to discuss.

10 So as Mr. Felsen described, there were two  
11 issues raised in the June 7th letter, document 102 in  
12 ECF, one related to Star's request for documents  
13 pertaining to demand number 9 as I understand it. And  
14 then the other issue pertaining to Star's fourth request  
15 for documents pertaining to demand 6.

16 So would you like to start, Mr. Felsen?

17 MR. FELSEN: Sure. You want me to address  
18 these two issues in document 102 first? Is that correct,  
19 your Honor?

20 THE COURT: I think we should probably go back  
21 and forth on each issue. It's usually a little bit more  
22 easy to follow. You want to start with demand 9 first  
23 and the letter and then we'll turn to Ms. Fitzgerald for  
24 her position?

25 MR. FELSEN: Sure, your Honor. With respect to

## Proceedings

1 document demand number 9 in plaintiff's second request  
2 for documents, so one of the hotly contested issues in  
3 this case is what the scope of work was during the  
4 engagement between Voynow -- that Voynow had with respect  
5 to the services it performed for Star. There is no  
6 written agreement so there's been a sharp factual dispute  
7 as to what exactly the scope of work was.

8           Now, with regard to demand number 9, it's our  
9 position that if other Voynow dealership clients had  
10 engagements that were for services other than just tax  
11 returns and they paid, those clients paid Voynow in the  
12 same manner and similar amounts as Star, it would be  
13 indicative that Star had the same engagements as those  
14 other dealership clients. And we're not asking for every  
15 single engagement. We've asked for a sample.

16           And we've met and conferred with Ms. Fitzgerald  
17 and we initially asked for the years 2013, 2015, a  
18 sampling of three. We then came to a compromise of 2014  
19 and 2015. But then we weren't able to agree on anything  
20 further. We had requested that three dealership clients  
21 of Voynow for tax returns to be provided and three  
22 dealership clients where it was review services be  
23 provided.

24           Ms. Fitzgerald unilaterally just provided us  
25 with three engagements but for one auto group, Thompson



## Proceedings

1 auto group, who has various automobile dealerships within  
2 that group. And she chose on her own. We want to be  
3 able to a random sampling of ones that we choose. We're  
4 fine with Thompson but we want to receive engagement  
5 letters for two other auto groups, Kerbeck Auto Group and  
6 Peruzzi Auto Group.

7 THE COURT: Could you spell those for me?

8 MR. FELSEN: K-E-R-B-E-C-K, and Peruzzi,  
9 P-E-R-U-Z-Z-I.

10 In addition, to the extent that the engagement  
11 letters do not provide information about the price was  
12 for the engagement, then we'd ask that we receive  
13 invoices also to provide us with information about what  
14 those dealerships actually paid to Voynow.

15 THE COURT: How did you arrive at Kerbeck and  
16 Peruzzi?

17 MR. FELSEN: Those were dealerships that there  
18 was testimony about during depositions.

19 THE COURT: But how is it relevant. I mean we  
20 talked about this, you know, at an in-person conference  
21 months ago about how every client is different in  
22 comparing documents of engagement with regard to one  
23 client may be really apples and oranges compared to  
24 another client depending on size, scope, need, volume of  
25 business. Who knows which factors, right? That's why

Proceedings

1 accounting contracts and retainers are often very highly  
2 customized, in my understanding.

3           So you know, we talked about this literally  
4 months ago and so I'm curious, you know, where the  
5 breakdown occurred with regard to the parties'  
6 discussions because as of the June letter, it had been  
7 represented that this issue was largely moot, that the  
8 defendant had provide stuff and then now it seems as  
9 though you guys just disagree about what should be  
10 provided. And I don't understand why you think you're  
11 entitled to these specific clients.

12           MR. FELSEN: We believe that these dealership  
13 groups are similar in size to Star, so therefore, it'll  
14 be a good comparator to determine what the retainer says  
15 and what was actually paid.

16           THE COURT: Do you have any sense of what work  
17 they were hired to do?

18           MR. FELSEN: They had a review engagement those  
19 two groups.

20           THE COURT: And how do you know that?

21           MR. FELSEN: I believe based on the deposition  
22 testimony of a Voynow representative.

23           THE COURT: Okay. All right. So Ms.  
24 Fitzgerald, would you like to respond?

25           MS. FITZGERALD: Sure. So first of all, I

Proceedings

1 think we need to start with request number 9, the actual  
2 request, and the request asks for a sample of documents  
3 concerning Voynow's retainers or engagement letters with  
4 other dealerships. There's never been a request for  
5 invoices. It's been a sample of engagement letters.

6 And your Honor is right in the sense that we've  
7 been sort of around the block on this issue multiple  
8 times because what the plaintiffs are trying to do is  
9 almost create this type of comparator concept which is a  
10 concept that exists in employment discrimination cases.  
11 It is not a concept that exists in professional liability  
12 case law.

13 And I've repeatedly challenged them to come  
14 forward with any kind of law that supports the notion  
15 that they can get discovery about pulling out other  
16 clients located in a different state with different sets  
17 of books and records with different types of issues and  
18 argue that that is somehow relevant to the services the  
19 Voynow provided to star. And there is no law. They  
20 haven't been able to do that because it doesn't exist.

21 So I think that it's been my position all along  
22 that this has been nothing other than a fishing  
23 expedition but when we were in front of your Honor the  
24 last time, they argued that they needed the sample  
25 engagement letters involving Thompson Auto Group and they

Proceedings

1 also wanted to depose the Thompson Auto Group controller.  
2 And your Honor denied their request for that deposition  
3 but then directed to me that to the extent I had  
4 engagement letters from Thompson, those be documents that  
5 I could produce. And I've done that.

6 I've given them two different engagement  
7 letters involving the Thompson Group that pertains to a  
8 review, financial state review engagement. And then I've  
9 given them an engagement letter that involved 21  
10 different entities that are affiliated with the Thompson  
11 Group which is a large group that reflected the tax  
12 engagement. So I've given that to them and now they're  
13 coming back and saying oh, now this is the first time I'm  
14 hearing about Kerbeck or Peruzzi and I can represent to  
15 you that there's been no deposition testimony in any way  
16 saying that Voynow provided services akin to a review or  
17 something less than an audit or whatnot, or that there's  
18 any similarity between those two entities and the Star  
19 Group.

20 So I mean I think we have to go back to what  
21 the law says in terms of the fact that there is no  
22 concept of comparators in professional liability cases.  
23 This case is going to be decided upon the engagement  
24 letter and the plaintiffs are wrong when they say there  
25 is no engagement letter. There is engagement letters.

Proceedings

1 They never signed them, but there are engagement  
2 letters.

3 So the jury is going to look to what's in the  
4 engagement letter and then they're going to look at  
5 Voynow's work papers as far as that shows what they did.  
6 What happened in a different state in a different type of  
7 engagement like an attestation engagement such as a  
8 financial statement review engagement, has no relevance  
9 whatsoever.

10 And even under the broad standard of relevance  
11 and Rule 26, you just can't justify allowing this type of  
12 discovery that has to do with, you know, Voynow's  
13 relationships with its other clients. Simply, it's so  
14 far outside the threshold of relevance. And I think when  
15 they wanted to make the point that there are different  
16 engagement letters that Voynow issued that pertain to  
17 reviews, and they have that now because I gave that to  
18 them in the Thompson documents and I gave them similar  
19 other engagement letters that have to do with tax only  
20 engagements. So they have that. They have that  
21 language. To now expand it to go on a fishing expedition  
22 for other Voynow clients is just well outside the scope  
23 of what's permissible.

24 And like I said, invoices have never ever --  
25 were never even part of request number 9, so that should

Proceedings

1 be just discarded, you know, right at the outset.

2 So that's our position, Judge.

3 THE COURT: Mr. Felsen --

4 MR. FELSEN: Your Honor, may I respond?

5 THE COURT: Yes, Mr. Felsen.

6 MR. FELSEN: May I respond briefly, your Honor?

7 THE COURT: Yes. I'm trying to make a record  
8 of who's speaking, so please. Mr. Felsen, would you like  
9 to respond?

10 MR. FELSEN: Yes. Thank you, your Honor.

11 With respect to invoices, we're not looking for  
12 invoices to the extent that the engagement letters  
13 identify the price. The only reason we are asking about  
14 invoices is we want to know what the price is. So we  
15 don't need every invoice. We just need to know how much  
16 was paid under these retainers.

17 Scope of work is at the heart of this case  
18 here, so comparators are needed. We need to look at  
19 other evidence since there's no written signed engagement  
20 letter between the parties. So other discovery devices  
21 are necessary. This is not a fishing expedition. We're  
22 not asking for every single engagement letter. We've met  
23 and conferred and all we're asking for is two other  
24 dealership groups. We're not asking for every single  
25 review engagement. That's not a fishing expedition.

Proceedings

1 We've narrowly tailored this to two dealerships.

2 THE COURT: So the Thompson documents are  
3 sufficient? I mean first of all, do you take issue, Mr.  
4 Felsen, with the representation that this is the first  
5 time you're identifying Kerbeck and Peruzzi by name?

6 MR. FELSEN: Yes. We have (audio cut out) with  
7 Ms. Fitzgerald those specific dealerships. She just gave  
8 us Thompson. We had talked about giving other names but  
9 we didn't specifically identify them previously.

10 THE COURT: Okay. And why are the Thompson  
11 documents insufficient?

12 MR. FELSEN: We'd like to have a sampling.  
13 It's just one dealership group.

14 THE COURT: But aren't there like 21  
15 affiliates? Don't you now have the distinction between  
16 the tax engagement and the tax and review engagement?

17 MR. FELSEN: Thompson is just one auto group  
18 that she cherry picked.

19 THE COURT: That's not responsive to my  
20 question. Do you now have samples of the tax engagement  
21 style and the larger style that includes the review  
22 engagement?

23 MR. FELSEN: Yes, through Thompson.

24 THE COURT: And why do you believe that  
25 additional examples will in any way change the analysis?

Proceedings

1 MR. FELSEN: Because Ms. Fitzgerald cherry  
2 picked Thompson and we don't know what the contents will  
3 be of these other auto groups' engagement letters.

4 And your Honor, you know, Ms. Fitzgerald by --

5 THE COURT: But Mr. Felsen, this is like where  
6 we were when you guys were performing at the beginning of  
7 the summer. What does it matter if a different client  
8 had a relationship with Voynow that provided them with  
9 particular services? What matters to prove malpractice  
10 here and the negligence here is what they were hired to  
11 do here.

12 MR. FELSEN: Right. And your Honor, that's in  
13 dispute and --

14 THE COURT: I know it's in dispute, but what  
15 they did to a different client isn't going to change what  
16 conversations transpired between the principals of Star  
17 and the principals of Voynow.

18 MR. FELSEN: But the contents of an engagement  
19 letter for solely tax preparation work versus the  
20 contents of an engagement letter for review work, it  
21 would be different. And to the extent that the  
22 engagement letter for review work addresses duties that  
23 Voynow performed for Star, it would tend to establish  
24 that Star, like Thompson, had more than an engagement  
25 that covered more than just tax preparation.



Proceedings

1 THE COURT: But doesn't there need to be a  
2 meeting of the minds here with regard to what the  
3 contract should have included? What you essentially have  
4 is a disconnect between the principals of Star and the  
5 principals of Voynow, correct?

6 MR. FELSEN: Yes, your Honor.

7 THE COURT: I just really --

8 MR. FELSEN: Your Honor --

9 THE COURT: As I have struggled with it back in  
10 May or June, whenever we were together, I'm still  
11 struggling with the concept that a different contract is  
12 going to shed any light whatsoever on what these parties  
13 agreed to do here.

14 MR. FELSEN: Your Honor, there's also the  
15 circumstances of the Thompson retainer is such that it's  
16 dated 2015 but it's signed in 2017. We would be amenable  
17 to one of these others that we pick, Kerbeck or Peruzzi.  
18 And if you don't agree to one of those then some of the  
19 auto group that we can pick.

20 THE COURT: Ms. Fitzgerald, would you like to  
21 respond?

22 MS. FITZGERALD: I don't think that that  
23 argument has any bearing on when the client actually  
24 signed the engagement letter. They have the difference  
25 in the wording of the two types of engagement. They have

Proceedings

1 what's the standard tax engagement which is an entity  
2 that, was a letter that has to do with 21 different  
3 entities that I produced. Okay? So they have that level  
4 of service.

5 And then they have two samples of review  
6 engagements and two management representation letters  
7 that I also provided from the Thompson related entities.  
8 So they have the wording to the extent they even want to  
9 try to argue.

10 But the issue as far as what Voynow's  
11 engagement with Star is, that's going to be determined by  
12 the following. The actual letters that were issued  
13 between Star and Voynow irrespective of whether Star  
14 signed them. By the testimony of Michael Koufakis on one  
15 hand and Randy Franzen and his colleague who was present  
16 when the engagement was actually agreed to. Okay? So  
17 that's verbal testimony.

18 There's metadata that supports the existence of  
19 engagement letters issued every year by Voynow. There's  
20 references in bills and there's references in emails that  
21 support the existence of engagement letters being issued  
22 every year by Voynow. There's a change in format to  
23 those letters and the reason why. That's all in the  
24 testimony.

25 And then there's the fact that Star's owner,

Proceedings

1 John Koufakis, admitted under oath that they don't sign  
2 contracts as a matter of course.

3 So the jury is going to hear all of that  
4 evidence. And that's the evidence, that's important  
5 evidence for the jury to decide whether or not this was a  
6 tax engagement and whether or not that -- because it  
7 doesn't, the letter doesn't have to be signed in the tax  
8 engagement. There is no requirement for it to be signed  
9 in order for the tax returns to be issued. But that's  
10 the evidence that the jury is going to hear and that's  
11 what the jury is going to decide. It has nothing to do  
12 with what Voynow issued to a different client in a  
13 different state for a different time period for a client  
14 that has different books and records. None of that has  
15 any bearing on what the scope of the engagement is  
16 between Star and Voynow.

17 THE COURT: Mr. Felsen?

18 MR. FELSEN: Your Honor, Ms. Fitzgerald gave us  
19 Thompson. So by doing that she acknowledged that it's  
20 relevant. And she doesn't get to pick and choose --

21 THE COURT: No, she did not, Mr. Felsen. She  
22 has never acknowledged it's relevant. I was there at the  
23 oral argument. Go ahead.

24 MR. FELSEN: I don't believe you directed her  
25 to produce Thompson. That was something that she agreed

Proceedings

1 to during a meet and confer.

2 MS. FITZGERALD: Yes. That was the one that  
3 you requested specifically so I agreed to give you  
4 Thompson.

5 THE COURT: The fact that she gave you  
6 documents through a negotiated discovery process is not  
7 evidence of her views on relevance. Do not make that  
8 mistake.

9 MR. FELSEN: Understood, your Honor. Just with  
10 respect to Ms. Fitzgerald's belief as to what evidence  
11 the jury will consider, I mean that doesn't exclude us  
12 from getting other relevant information. She doesn't get  
13 to just choose what's relevant and what's not relevant.  
14 I mean we're entitled to relevant documents and we  
15 believe that this other engagement letter from another  
16 dealership is relevant.

17 THE COURT: What's the payment arrangement that  
18 Thompson utilizes, Mr. Felsen?

19 MR. FELSEN: The engagement doesn't contain  
20 information about the payments.

21 THE COURT: You don't know whether it's a  
22 monthly retainer or a particular set fees depending on  
23 the level of service?

24 MR. FELSEN: No, your Honor.

25 MS. FITZGERALD: So there was testimony on this

Proceedings

1 issue, Judge, by Voynow's managing partner and he said  
2 that all Voynow clients, regardless of the level of  
3 engagement, are billed on a retainer as the work is done  
4 and billed, it's offset against that retainer. So all  
5 clients are billed in that manner. And that's just  
6 because, you know, accountants' work is typically  
7 seasonal so that's how they stay afloat.

8 THE COURT: And one follow-up for Mr. Felsen,  
9 do you take issue with the representation by Ms.  
10 Fitzgerald that engagement letters need not be signed  
11 under the AICPA guidelines for tax engagement?

12 MR. FELSEN: We don't agree with Ms.  
13 Fitzgerald's conclusion on that.

14 THE COURT: You don't.

15 MS. FITZGERALD: Well, their expert just  
16 testified that he agreed.

17 THE COURT: I mean the AICPA guidelines I assume  
18 are in plain English. I can pull them up right now. So  
19 what is your view on what the AICPA guidelines require  
20 with respect to tax engagement specifically, Mr. Felsen?

21 MR. FELSEN: Our understanding is that once an  
22 engagement letter is issued it's signed by the client.

23 THE COURT: On page 14 of document ECF 102, I  
24 assume the defendant's position on this issue, the  
25 defendants posit that the AICPA did not and still does

Proceedings

1 not mandate that a taxpayer sign tax engagement letters  
2 before tax accountants can issue their tax return. And  
3 so Voynow never chased after them essentially is how I  
4 reading this for the signed engagement letter. Is that a  
5 fair read of your argument, Ms. Fitzgerald?

6 MS. FITZGERALD: That's correct. I mean the  
7 AICPA recommends but does not require. And that's  
8 different from financial statement engagements such as a  
9 review or an audit. And there, the AICPA mandates that  
10 you have both a signed engagement letter and a signed  
11 management representation letter from the client.

12 THE COURT: Mr. Felsen, would you like to be  
13 heard on this?

14 MR. FELSEN: Our position is that this wasn't  
15 just a tax engagement and it was a review engagement and  
16 therefore it had to be signed.

17 THE COURT: I understand that but that's not  
18 what this letter says, correct?

19 MS. FITZGERALD: The letter says it's only a  
20 tax engagement, yes.

21 THE COURT: I mean you take issue with the  
22 letter. You're saying they never signed the letter, they  
23 didn't agree to it. They understood the scope of work to  
24 be something different. I understand that is your  
25 argument. But under the Rules of Professional

Proceedings

1 Responsibility governing accountants, they were not  
2 required to chase after your client for a signature if  
3 they understood it to be a tax engagement. Correct, Mr.  
4 Felsen?

5 MR. FELSEN: If it was a tax engagement,  
6 correct. But again, your Honor, our clients didn't  
7 receive -- the testimony from our clients is they never  
8 received these letters and there's no evidence that our  
9 clients received them.

10 MS. FITZGERALD: We would disagree with that.  
11 Initially the letters were sent to the three brothers  
12 individually for each of their companies that they own.  
13 And one of the brothers, John Koufakis, told our clients  
14 hey, instead of doing it this way, put them all, after  
15 getting the letter, put them all on a single letter. So  
16 put all the Star companies on a single letter and then  
17 address it to Michael Koufakis. So that was done. The  
18 paper trail reflects a change in the format which was  
19 done at the request of John Koufakis. Michael Koufakis  
20 admitted that he got at least the 2016 letter and he does  
21 not know or does not recall whether or not he got the  
22 other letters. You know, we can get into what the  
23 evidence is going to show as far as the documents that  
24 Star definitely got from Voynow and the fact that they  
25 haven't produced those in discovery in this case. But I

Proceedings

1 mean I think that's getting a little bit far off what  
2 we're talking about today. But there's going to be  
3 substantial evidence introduced showing that Star did in  
4 fact get these letters. But I think for purposes of our  
5 discussion today, the point is that they have the sample  
6 format of what a review engagement letter looks like and  
7 they have the sample format of what a tax engagement  
8 looks like because I gave that to them through the  
9 Thompson entity which is the entity that they definitely  
10 requested they wanted. I don't think it's relevant but I  
11 gave it to them.

12 We don't need to go any further on that. We  
13 don't need to now bring in other entities that I'm  
14 hearing about for the very first time that are unrelated  
15 to Star.

16 THE COURT: Ms. Fitzgerald, Ms. Fitzgerald, I  
17 didn't ask you a question and I'm really not even sure  
18 what you're talking about. I was about to make a ruling  
19 and I was speaking when you started speaking and I truly  
20 am not clear on what you're trying to say.

21 MS. FITZGERALD: Sorry, I'm sorry, your Honor.  
22 I didn't realize. I thought you had wanted to hear from  
23 me but I apologize if not.

24 THE COURT: So as I was starting to say, this  
25 issue has been pending now for many months and we've been



Proceedings

1 going around, the parties have been going around in  
2 circles trying to find some solution with little success.  
3 In the June 7, 2023 motion, the plaintiffs requested that  
4 the Court direct defendants to produce, and I quote,  
5 "written engagement agreements between Voynow and a  
6 sample of other dealerships who retained Voynow to  
7 perform solely tax preparation work and also to perform  
8 work separate and apart from solely tax preparation."

9 That is on page 3 of ECF number 102. That  
10 motion stated that the parties agree that the defendants  
11 would produce three sample tax only agreements and three  
12 sample agreements for tax and review services.

13 As of September 7, 2023, plaintiffs contended  
14 that the defendants produced only engagement letters from  
15 the Thompson Auto Group and no other automotive groups  
16 and claimed that the defendants provided no rationale for  
17 limiting their production to Thompson Auto Group.

18 We've now discussed the history of this for a  
19 length of time today and the distinction between the  
20 types of engagements that are represented in the Thompson  
21 Auto Group documents. And I frankly do not think any  
22 further discovery on this issue is warranted. The  
23 question of engagement letters with respect to other  
24 entities is not proportional to the needs of this case  
25 where the issues pertain to the agreement that was in

Proceedings

1 place between Star and Voynow. The fact that you now  
2 have some samples seems more than sufficient given the  
3 very, very minimal relevance of this particular class of  
4 documents.

5 So the court is not inclined to order that the  
6 defendants have to produce any further written  
7 engagements between Voynow and a sample of other  
8 dealerships.

9 I also note that the parties did not even meet  
10 and confer on the specific request that the plaintiff is  
11 now positing as the documents they're seeking. You  
12 acknowledged just moments ago, Mr. Felsen, that you had  
13 never requested specifically in a meet and confer the  
14 documents for Kerbeck and Peruzzi and I deny the request  
15 on that grounds as well. So we're done with this  
16 particular issue.

17 Turning now to demand number 6, Mr. Felsen,  
18 would you like to start?

19 MR. FELSEN: Yes. Thank you, your Honor. So  
20 demand number 6, in demand number 6 we're looking for  
21 documents concerning checklists Voynow used regarding  
22 review engagements for auto dealer clients as referenced  
23 in David Kumar's deposition. Mr. Kumar is an employee  
24 for Voynow.

25 Michael Koufakis testified on behalf of the

Proceedings

1 plaintiff that his understanding of the engagement as  
2 explained to him by the principals of Voynow was that the  
3 engagement would be more than an audit, I'm sorry, more  
4 than a review and less than an audit.

5           Mr. Kumar testified at Exhibit 3, pages 140 to  
6 141 of the deposition that when Voynow performed review  
7 engagements, it used checklists. Voynow's argument  
8 principally is that Star isn't entitled to this because  
9 Voynow's position is that it only prepared tax returns.  
10 Obviously, that's not the case. There's been no ruling  
11 on that particular issue and that's one of the primary  
12 issues in this case.

13           So Voynow, throughout the litigation and at the  
14 deposition, has tried to relate all tasks that it  
15 performed for Star to preparation of tax returns. But if  
16 there are certain tasks that are contained on these  
17 checklists that Voynow used for review clients, if on  
18 those checklists it identifies tasks that are being done  
19 by Star, it would tend to establish that Voynow was  
20 actually doing that work for Star.

21           So it's entirely relevant. It's critical to  
22 the central issue in this case related to what the scope  
23 of work was.

24           Also, I just want to note for the Court that  
25 they produced another type of checklist in discovery. It

Proceedings

1 was a checklist related to the tasks for controllers.  
2 We're not looking for confidential client information.  
3 All we're looking for is the checklist. They can redact  
4 any information related to the identity of any Voynow  
5 client. But this is entirely relevant and we'd ask that  
6 the Court direct Voynow to produce this checklist.

7 THE COURT: So this checklist question really  
8 is someone ephemeral to me, right? Because it seems as  
9 though, you know, the production of checklists for a  
10 separate client could be somewhat problematic. And I  
11 wonder, the question about a blank checklist, whether  
12 that actually provides me much insight.

13 So would you be satisfied with a blank  
14 checklist? That's what you say on page 5 of ECF 102.  
15 Star --

16 MR. FELSEN: Yes.

17 THE COURT: The blank form checklist is what  
18 Star is seeking, not any checklist for client  
19 information.

20 MR. FELSEN: Correct, your Honor.

21 THE COURT: So Ms. Fitzgerald, does such a  
22 document exist? Is there like a template that Voynow  
23 uses to prepare checklists for when they go out on an  
24 engagement?

25 MS. FITZGERALD: So those types of blank

Proceedings

1 documents can be pulled right off the AICPA website. And  
2 I think, I mean the plaintiffs actually did that when  
3 they submitted I think it's Exhibit 9 to one of their --  
4 I think it's two docket 102. Exhibit 9 is a blank AICPA  
5 checklist for a tax engagement. So they're looking for a  
6 blank --

7 THE COURT: I understand that there are  
8 publicly available checklists but that is not my  
9 question, Ms. Fitzgerald.

10 MS. FITZGERALD: Yeah. I don't know that  
11 Voynow has any checklists that are not already with  
12 client's specific information on them.

13 THE COURT: I find that hard to believe, Ms.  
14 Fitzgerald because --

15 MS. FITZGERALD: I'm sorry?

16 THE COURT: I find that really hard to believe  
17 because I have yet to meet a company or office or, you  
18 know, division that doesn't create their own internal  
19 templates.

20 MS. FITZGERALD: So I guess what I was trying  
21 to say is whether or not they could get that, like  
22 download it from the AICPA website as a blank document,  
23 probably, yeah. But as I understood the question, the  
24 request that they were looking for, they were looking for  
25 the checklists that were actually used in actual review

Proceedings

1 engagements for other clients.

2 THE COURT: You're telling me that the Voynow  
3 accountants literally pull of the AICPA website when they  
4 go out for an engagement? I don't buy it.

5 MS. FITZGERALD: So they are --

6 THE COURT: They don't maintain a blank  
7 checklist?

8 MS. FITZGERALD: It's a publication. I want to  
9 say it's Pearson that publicizes these checklists that  
10 accountants use.

11 THE COURT: I'm asking you whether or not  
12 Voynow has a template for their own internal checklists.

13 MS. FITZGERALD: They have this published  
14 document that's put out by another entity. It's not an  
15 internal Voynow template.

16 THE COURT: I reviewed a fair amount of  
17 accounting records back when I was a white-collar  
18 prosecutor and I have not seen most accountants utilize  
19 like publicly available published forms, Ms. Fitzgerald,  
20 and I'm really struggling to credit -- I'm not saying  
21 that you are representing anything. I'm just wondering  
22 if you know the answer. Are you sure that Voynow doesn't  
23 have an internal template?

24 MS. FITZGERALD: The templates are -- and  
25 there's been testimony about this, Judge. So it's a

Proceedings

1 company, and I believe it's Pearson, that publishes these  
2 documents. So that's the template that -- it's a  
3 publication by the company that lists the template.

4 And I think if you look at the template that  
5 the plaintiff attached as a blank one, you can see that  
6 it's a publication that's put out by another entity. So  
7 there's not a Voynow specific oh this is what we do in a  
8 review engagement. It's a publication that, you know, it  
9 has a checklist and accountants go through it and they  
10 decide okay, is this a relevant step for this particular  
11 client for this particular engagement? And if so, you  
12 know, they would follow that step. But it's not a Voynow  
13 specific generated template. It's something that's  
14 published by another party used by accountants.

15 THE COURT: Mr. Felsen, do you have any  
16 evidence to suggest that they don't just use the standard  
17 public form?

18 MR. FELSEN: Yes, your Honor. Mr. Kumar's  
19 testimony, Exhibit 3 on page 141, he testified --

20 THE COURT: Exhibit 3 to what? Exhibit 3 to  
21 ECF number?

22 MR. FELSEN: I'm sorry, it's document 102-3.

23 THE COURT: Okay. Thank you.

24 MR. FELSEN: On page 141.

25 THE COURT: Let me just get there. My computer

Proceedings

1 is being very, very slow to open this PDF here. Hold on.  
2 Give me one second. You said page 141?

3 MR. FELSEN: Page 141 at the top on line 1  
4 starting. It says, "We would follow checklists. The  
5 checklists change from year to year." So based on his  
6 testimony, there's a different checklist each year.

7 And in addition, your Honor, the checklist --

8 THE COURT: What about that suggests that's not  
9 the AICPA checklist?

10 MR. FELSEN: Your Honor, that doesn't  
11 specifically say whether it's the AICPA checklist or not.  
12 But the point is that they had a different checklist each  
13 year that they used.

14 And when you also look at the fact that the  
15 controller checklist has Voynow's name at the top and  
16 bottom of it, it would show that Voynow, when they use  
17 checklists, they put their name on it.

18 So we would ask that they produce the  
19 checklists that they use that their name is on. And if  
20 their name is not on it and they use the AICPA checklist,  
21 then they should confirm that. It doesn't seem like Ms.  
22 Fitzgerald is fully aware as you can hear today.

23 THE COURT: I'm looking at Exhibit 8 and 9.  
24 Give me one second.

25 MR. FELSEN: Your Honor, the checklist for the



Proceedings

1 controller says at the top dealership internal control  
2 checklist and it's got Voynow's name at the bottom.

3 THE COURT: I know. That's what I'm looking  
4 at, documents 8 and 9.

5 So how do these checklists interrelate with the  
6 checklists that we're talking about, Ms. Fitzgerald, if  
7 you know?

8 MS. FITZGERALD: So Exhibit 9 is a 2021 tax  
9 return S Corporation checklist. Okay? What Mr. Kumar  
10 was asked about at his deposition was, you know, what  
11 types of engagement he worked on when he was at Voynow  
12 and he said, you know, he had done tax engagements and he  
13 had also done review engagements. He made very clear  
14 that for Star it was only a tax engagement. But to the  
15 extent that he did work on review engagements for other  
16 clients, he talked about the fact that there were  
17 checklists that were used for those types of engagements  
18 that were 40 to 60 pages.

19 And you know, to the extent Mr. Felsen is  
20 arguing that those checklist changed every year, well,  
21 those checklists would have the year of the financial  
22 statement engagement. So whether it was 2015 or 2016,  
23 that would be reflected on the year of the checklist.

24 I believe that -- I think that answers your  
25 question.

Proceedings

1 THE COURT: Not exactly, no. So you know,  
2 Exhibit 8 is a different type of checklist than Exhibit 9  
3 and it does have Voynow's name at the top and the  
4 bottom --

5 MS. FITZGERALD: Yes.

6 THE COURT: -- of the first page. And my  
7 question was how do these checklists interrelate with the  
8 checklists that you understand plaintiff to be seeking?

9 MS. FITZGERALD: Yes.

10 THE COURT: So you know, the Exhibit 9  
11 checklist in fact does appear to be an AICPA checklist  
12 for income tax return preparation. Fine.

13 MS. FITZGERALD: Right.

14 THE COURT: You get this online.

15 MS. FITZGERALD: So okay --

16 THE COURT: The question is with regard to  
17 Exhibit 8, I mean to me if Voynow has a blank checklist,  
18 you should just produce it and we should be done with  
19 this. I think we just need an answer to the question of  
20 whether or not Voynow was in the practice of preparing  
21 their own internal checklist or literally just went to  
22 AICPA and printed out a form each time.

23 MS. FITZGERALD: Yes. So for the review  
24 engagement, that would be a similar type of publication,  
25 whether it's the Pearson company that I believe is what

Proceedings

1 the testimony said similar to what is on Exhibit 9.  
2 Exhibit 8, so that document came about after Star fired  
3 their two controllers. In 2017, they asked Voynow to  
4 assist the new controller that they hired because she had  
5 no experience. So this was a document -- this is not an  
6 accountant, procedures that accountants do. This was a  
7 document that is in your capacity as a dealer, as a  
8 controller, these are things you should be doing as part  
9 of your job. So that's the difference between the two  
10 documents.

11 THE COURT: Right. But I still don't have an  
12 answer as to whether Voynow created any internal  
13 checklist or literally just used the AICPA forms each  
14 time.

15 MS. FITZGERALD: Yes. So it is the form that  
16 they used. And they would tailor it as needed to the  
17 particular type of review engagement that they were on,  
18 but it's not --

19 THE COURT: What do you mean they would tailor  
20 it? It's a standard form. How do they tailor it?

21 MS. FITZGERALD: So like for instance, let's  
22 just say, you know, there is a -- and I'm just  
23 hypothetically thinking, but just say on a checklist  
24 there's petty cash. If a client doesn't have petty cash,  
25 then that would be something that you would just mark N/A

Proceedings

1 as you're completing the checklist as an accountant. You  
2 know, or if an accountant, you know, if the company  
3 doesn't have like a certain type of inventory, you know,  
4 you would skip over something like that. You tailor it  
5 as needed to your client, but that's how it's tailored to  
6 a client's specific engagement.

7 THE COURT: What you're saying is internally  
8 inconsistent to some extent, Ms. Fitzgerald. By saying  
9 they're tailoring the checklist, you're suggesting that  
10 they're editing it.

11 MS. FITZGERALD: No, I'm just saying you skip  
12 over it. Like you don't complete it.

13 THE COURT: No, but that's what you are  
14 literally saying, ma'am, with all respect. When you just  
15 say N/A, you're not tailoring the checklist. You're  
16 filling it out as not applicable. There's a very  
17 different meaning.

18 And so what I'm trying to get at is whether or  
19 not there is evidence in this case that the AICPA  
20 checklists were the ones utilized for both potential  
21 types of review here, the tax engagement and/or the  
22 review engagement.

23 MS. FITZGERALD: So the testimony and the work  
24 papers make clear that there were no checklists used for  
25 the tax engagement. They're not required to --

Proceedings

1 THE COURT: Totally not responsive to my  
2 question. My question is is there evidence in this case  
3 about Voynow's practices with regard to checklist  
4 utilization with regard to tax engagement and the review  
5 engagement? Where did the checklist come from?

6 MS. FITZGERALD: So the evidence is they were  
7 asked do you use checklists for tax engagements? The  
8 answer is no.

9 THE COURT: Okay.

10 MS. FITZGERALD: Do you use checklists for  
11 review engagements? The answer was yes. And that was  
12 what Mr. Kumar's testimony had to do it.

13 THE COURT: Right. Mr. Kumar's testimony is  
14 ambiguous as to where the checklists originate. Is there  
15 evidence in the case with regard to where they get their  
16 checklists?

17 MS. FITZGERALD: Yes. And that's what I'm  
18 trying to pull up. And it was a publication and that's  
19 where the name Pearson is coming up. And I can't recall  
20 specifically which deposition it was, but one of the  
21 Voynow folks explained that that's where they get the  
22 checklists that they use. It's published by a third  
23 party.

24 THE COURT: Mr. Felsen, do you recall which  
25 deposition that was?

Proceedings

1 MR. FELSEN: Not off the top of our heads, your  
2 Honor.

3 THE COURT: Okay. I can't order Ms. Fitzgerald  
4 to produce something that doesn't exist, Mr. Felsen. If  
5 it is true that Voynow utilized the AICPA checklist for  
6 their review engagement consistently and that was their  
7 standard practice, which actually makes sense to some  
8 degree for a small firm not to reinvent the wheel, but I  
9 can't possibly weigh in on what their actual business  
10 practice was.

11 All of that being said, I can't order her to  
12 produce something that doesn't exist. If there's  
13 testimony and evidence in the case that they did not use  
14 checklists for tax engagements, there will be no  
15 checklists to produce in that regard. If the evidence in  
16 the case indicates that they used the AICPA form for  
17 their review engagements, they don't have an internal  
18 document to produce that wouldn't have client information  
19 on it.

20 So you have Exhibit 9. It appears to be one of  
21 the AICPA forms. What I'm going to direct the parties to  
22 do once again is to meet and confer on this issue and  
23 please drill down with your client, Ms. Fitzgerald, and  
24 if you need to put it in a declaration or an  
25 interrogatory or something to close out this issue,

Proceedings

1 please do so. But we need a definitive answer about  
2 whether or not Voynow had their own internal blank  
3 checklists that the accountants would use for review  
4 engagements or whether or not they were simply using the  
5 AICPA form. Is that clear to you, Ms. Fitzgerald? Do  
6 you understand what I'm saying?

7 MS. FITZGERALD: Yes.

8 THE COURT: Okay. So on this issue, the  
9 plaintiff's request for the documents in the motion that  
10 I ordered defendants to provide them is denied without  
11 prejudice because I don't have sufficient evidence before  
12 me to establish that the documents exist. But I am  
13 directing the parties to meet and confer to confirm  
14 whether or not -- to confirm what Voynow's business  
15 practice was. If there was a checklist, Ms. Fitzgerald,  
16 please provide it. If there was no checklists, please  
17 come up with some sort of a workaround to have that fact  
18 documented in the discovery record whether it is one  
19 quick interrogatory or declaration. We have to close  
20 this issue out. Ms. Fitzgerald, does that work for you?

21 MS. FITZGERALD: Yes.

22 THE COURT: All right. So the next two issues  
23 that were raised pertain to the filing that was made in  
24 August, document 108.

25 First was a motion to quash a subpoena to

Proceedings

1 Withum, plaintiff's current accounting firm. So again,  
2 Mr. Felsen, this is your motion. Would you like to  
3 start?

4 MR. FELSEN: Yes. Thank you, your Honor. So I  
5 just want to go through some quick procedural history  
6 relating to discovery.

7 On December 5, 2022, the Court ordered fact  
8 discovery closed as of March 17, 2023 and all discovery  
9 closed on August 18, 2023.

10 A few months later, March 28, 2023, the Court  
11 entered an order reiterating that the March 17, 2023  
12 deadline remains and ordered the parties to meet and  
13 confer and try to resolve some pending discovery  
14 disputes.

15 Then we fast forward to July 25, 2023. Star  
16 submitted a letter asking for more time to complete  
17 expert discovery only and proposed dates for expert  
18 disclosures as well as expert depositions. Star didn't  
19 ask to extend fact discovery. Voynow certainly didn't.  
20 Voynow has adamantly and strenuously opposed every  
21 attempt by Star to extend the discovery deadline, the  
22 fact discovery deadline.

23 The Court entered an order on August 2, '23  
24 stating that fact discovery must be completed by August  
25 31, 2023 and set a schedule for expert discovery. In



Proceedings

1 that order, the Court did not reopen fact discovery.  
2 There was merely some miscellaneous discovery items that  
3 needed to be done. There was nothing before the Court  
4 asking any party, including Voynow, asking for the Court  
5 to allow new discovery to take place such as the issuance  
6 of subpoenas. The spirit of the order was that no new  
7 discovery would take place, that August 31st was the  
8 deadline to finish up whatever was outstanding.

9 Ms. Fitzgerald, on April, I'm sorry, August  
10 4th, four and a half months after the March 17, 2023  
11 close of discovery, served a subpoena on Withum, who is  
12 Star's current accountant, and by doing so Ms. Fitzgerald  
13 circumvented the August 2, 2023 order.

14 Now, the substance of the subpoena, so we  
15 believe that the subpoena should be quashed based solely  
16 on the fact that it was served after the close of  
17 discovery. But even if the Court were to entertain that  
18 subpoena, which we don't think it should, the subpoena  
19 should be quashed because it seeks information that's not  
20 relevant.

21 So Withum came up at a deposition of Michael  
22 Koufakis back in August of 2022, a year before (audio cut  
23 out) on August 4, 2023. So it's clear that Voynow could  
24 have served that subpoena and didn't, for whatever reason  
25 did not, and forgot to, and then took the opportunity

Proceedings

1 based on its August 2nd order to now engage in new  
2 discovery. They had plenty of time to serve that  
3 subpoena during discovery and they failed to do so.

4 Now, the substance of that subpoena is for  
5 engagement letters, invoices, and bills for the period of  
6 2020 through 2021. That information that they sought has  
7 nothing to do with the claims in this case. Withum  
8 became Star's accountant in 2020, years after the alleged  
9 acts in the complaint. The complaint alleges malpractice  
10 up through November 2017. Withum didn't become the  
11 accountant for three years.

12 Withum (audio cut out) after Voynow was  
13 terminated simply has no connection to Voynow's retainer.  
14 What Star did subsequently with respect to the accounting  
15 services that it received from accountants has no bearing  
16 whatsoever on this case. Also --

17 THE COURT: Isn't it somewhat analogous to your  
18 argument that what your relationship was with your  
19 subsequent accountant is perhaps reflective of your  
20 relationship with your prior accountant? Isn't that  
21 somewhat analogous to comparing the practices that Voynow  
22 undertook with other clients, what we started the day  
23 with?

24 MR. FELSEN: And your Honor ruled in favor of  
25 Ms. Fitzgerald on that. So if you believe it's

Proceedings

1 comparable then --

2 THE COURT: After you got some discovery, sir.

3 MR. FELSEN: So, if you believe it's

4 comparable, then --

5 THE COURT: After you got some discovery, sir.

6 MR. FELSEN: But your Honor, we're looking for  
7 engagements during the time that -- we were looking for  
8 engagements during the time that Star was being serviced  
9 by Voynow. They are now looking for engagements three  
10 years after the malpractice took place with respect to a  
11 totally different accounting firm.

12 THE COURT: I understand. All right. Ms.  
13 Fitzgerald?

14 MR. FELSEN: Just one more comment, your Honor.  
15 Ms. Fitzgerald is looking for information related to  
16 pricing and we just don't think that you can compare  
17 Withum, a large international accounting firm with  
18 Voynow, who's a regional accounting firm based in  
19 Pennsylvania with less than ten employees. You just  
20 can't compare. That's like comparing, you know, my firm  
21 to one of these huge national law firms. It's just  
22 not -- our rates aren't comparable to a huge law firm  
23 like that.

24 THE COURT: I understand the argument. Ms.  
25 Fitzgerald?

Proceedings

1 MS. FITZGERALD: So first, let me address the  
2 argument as to the discovery deadline. Plaintiffs had  
3 made numerous requests to extend that deadline and we did  
4 object, and the Court ruled in plaintiff's favor  
5 extending that deadline. So the Court's order issued on  
6 August 2nd extends the fact discovery deadline to August  
7 31st. There's no limitations, restrictions, or  
8 qualifications in that order as far as fact discovery.

9 And to the extent the plaintiff is trying to  
10 argue that only certain limited discovery was permitted  
11 after March, well that argument doesn't hold because the  
12 plaintiffs disclosed a brand new witness for the first  
13 time at the end of June. The plaintiffs produced almost  
14 5,000 documents in mid to late August. So both parties  
15 have engaged in fact discovery after that March deadline  
16 and that's consistent with the Court's order allowing  
17 discovery to take place up through August 31st.

18 So as to the second part of Mr. Felsen's  
19 argument, which is essentially that the subpoena seeks  
20 information that's not relevant, we disagree. First of  
21 all, the subpoena is very narrowly tailored. It only  
22 asks for two years of engagement letters and invoices.

23 And the reason why it's relevant is because, as  
24 has been alluded to throughout today, that there's a  
25 dispute between Michael Koufakis's version as to what he

Proceedings

1 hired outside accountants for versus Voynow's version.

2           So I took his deposition and the deposition was  
3 taken in August of 2022. So at that point, Withum was  
4 already engaged for over two years. And Mr. Koufakis  
5 testified that with regard to Voynow, he had hired them  
6 to conduct services just shy of an actual audited  
7 financial statement. He hired them to actually detect  
8 fraud and to actually verify every balance in every  
9 account on the balance sheet. And he said that that was  
10 what he hired Voynow to do for a 21-year period and that  
11 he had also hired Voynow's predecessor to provide that  
12 same level of service.

13           So basically, you have Mr. Koufakis testifying  
14 that for 30 years his outside accountant provided this  
15 significant level of service. And when I asked him what  
16 he was engaged -- what Withum was engaged to provide, his  
17 testimony was that oh, it's a fluid situation. I really  
18 don't recall. But he was the one who would have hired  
19 them.

20           And I think that we should be able to challenge  
21 his credibility because when you look at the fact that  
22 he's claiming that between 2017 and 2021 he discovered  
23 allegedly \$10 million worth of theft or fraud that was  
24 committed that supposedly wasn't detected by Voynow, and  
25 that on top of it there was an investigation by the New

Proceedings

1 York Attorney General against Star for Star employees  
2 defrauding customers, Chinese customers -- so you have  
3 that that occurred, that also occurred around 2018  
4 through 2020. So you have these two big alleging fraud  
5 activities and now you're going to claim that you only  
6 hired Withum to do something that is so far below the  
7 level of an audit engagement?

8 I mean it's our belief, and I'm 99 percent  
9 sure, that if the Court allows this subpoena, I'm going  
10 to get those engagement letters and they're going to show  
11 that it's a tax only engagement. So that, given the  
12 context of what's happened with this fraud, that  
13 undercuts Michael Koufakis's credibility because why  
14 would you go from such a high level of outside accountant  
15 services for 30 plus years and now you have supposedly  
16 all this massive fraud and you now scale it back to where  
17 you just have a tax engagement that is not intended to  
18 detect fraud?

19 So it's relevant to address his credibility,  
20 first of all. And then it's also relevant because the  
21 fraud, some of the fraud that is at issue actually is  
22 alleged to have occurred up through 2020 and was not  
23 discovered until either 2020 or 2021 which falls in the  
24 scope of Withum's engagement. So if Withum, I mean if  
25 Star is to believe that they hired Withum to do the same

Proceedings

1 type of level of attestation engagement that it did hire  
2 Voynow and the prior accountant, then there's an issue as  
3 to why Withum couldn't discover that type of fraud  
4 because it was only discovered by, you know, their  
5 current office manager who isn't even an accountant and  
6 who doesn't even have, you know, any education beyond  
7 high school.

8           So you have accountants who are professionals  
9 who supposedly aren't discovering this so-called fraud.  
10 It's relevant to the extent that how discoverable was  
11 this fraud or even is there a fraud? So again, the  
12 subpoena is very narrowly tailored.

13           And then the third piece as to why it's  
14 relevant, as to why we've asked for the invoices, is that  
15 the plaintiff's theory is that because of Voynow's bills  
16 that supposedly reflects that they did more than tax  
17 work.

18           And their expert made that plain. And when I  
19 took his deposition, I asked him what support he had to  
20 back up that opinion and he basically said well, you  
21 know, my own accounting firm would issue the tax work for  
22 dealerships back in 2015. And when I tried to ask him,  
23 you know, what was the type of clients, what was the size  
24 of the dealership, you know, where was the dealership  
25 located so that we could actually make some type of

Proceedings

1 comparison, he wouldn't disclose any of that information.

2 So if the Court allows me to get Withum's bills  
3 and if Withum's bills reflect that it was only a tax  
4 engagement, as I suspect that they will, and if those  
5 bills are comparable to what Voynow's bills were, then  
6 that supports our defense and it rebuts the plaintiff's  
7 claim that Voynow's bills suggest something more than a  
8 tax engagement.

9 THE COURT: So then the question of the  
10 monetary compensation, I mean didn't we discuss this at  
11 length in the context of the other engagement that the  
12 price may or may not have any relevance depending upon  
13 their pay structure? I mean I don't know that the money  
14 matters. I understand your argument with regards to the  
15 scope of the engagement, but I'm not completely sold on  
16 the invoices at all, Ms. Fitzgerald. How is it not Mr.  
17 Felsen's argument that a regional accounting firm may  
18 have very different rates than the national? They could  
19 be less, they could be more depending upon whether the  
20 larger firm has economy to scale. Paul Weiss is not  
21 comparable to a law firm in rural Pennsylvania.

22 MS. FITZGERALD: Right. So what the invoices  
23 would show, and I agree that there's variation in rates,  
24 but what the invoices would show is if this was a tax  
25 engagement, then you would have invoices that reflect a



Proceedings

1 tax claiming visit at one point of the year. You would  
2 have invoices that reflect a tax preparation visit at one  
3 point of the year. And then you would have invoices that  
4 reflect an interim year tax visit. So the invoices would  
5 reflect and support when it was that Withum was actually  
6 out there. And to the extent it matches up with the same  
7 type of three visits per year that Voynow was out there,  
8 then it does support, you know, irrespective if let's  
9 just say Withum bills at a higher hourly rate than Voynow  
10 did, the invoices are going to be relevant to support the  
11 scope of the engagement being those three types of on  
12 site visits.

13 THE COURT: Okay. Mr. Felsen?

14 MR. FELSEN: Yes, your Honor. So Voynow has in  
15 their possession (indiscernible) and invoices from  
16 another accounting firm, Rosenfield, that Star used  
17 subsequent to Voynow. So just like your Honor ruled with  
18 respect to demand number 9 where it was sufficient for  
19 Star to just have Thompson engagement, I respectfully  
20 submit that that should be the ruling here, that they  
21 already have Rosenfield and they shouldn't be entitled to  
22 anything else.

23 With respect to Mr. Koufakis's testimony, he  
24 testified that he uses other accounting firms and not  
25 exclusively Withum.

Proceedings

1           Also, Ms. Fitzgerald made a statement about a  
2 new witness that Star subsequently identified after  
3 discovery. We only learned about that witness at a  
4 30(b)(6) deposition that took place after the initial  
5 deadline for discovery. So that's the reason why that  
6 individual was identified.

7           THE COURT: Ms. Fitzgerald, anything final?

8           MS. FITZGERALD: So just as to the Rosenfield  
9 piece, so Rosenfield was hired to conduct a forensic  
10 accounting analysis. So that's different. They were  
11 hired, you know, after the alleged discovery of the  
12 alleged theft and they were also hired for purposes of  
13 being an expert in this case. So those types of bills  
14 aren't really comparable or reflective of what your  
15 prototypical tax engagement would have looked like.

16           THE COURT: Mr. Felsen, anything in response?

17           MR. FELSEN: Your Honor, Rosenfield did tax  
18 work also. And your Honor, to the extent that they're  
19 allowed this, it's going to prejudice us because, you  
20 know, there's no -- discovery is closed and, you know,  
21 they're going to get this and that's the end of it?  
22 There's no further discovery on this issue? Their time  
23 to get this has well passed. They should have asked for  
24 this a long time ago. We would have objected back then.  
25 But due to the fact that they requested this after

Proceedings

1 discovery closed, it should be rejected based on that  
2 ground alone.

3 THE COURT: I understand both sides' arguments.  
4 So starting first with the argument as to timing, I would  
5 just like to note that in the August 21, 2023 motion by  
6 plaintiff, plaintiff's sought to quash the subpoena  
7 served on Withum, plaintiff's current accounting firm, as  
8 both untimely and irrelevant. That's in the motion to  
9 quash the subpoena at ECF 108.

10 Plaintiffs seem to argue that the Court  
11 unintentionally extended the deadline to close fact  
12 discovery when the Court was only requested to extend the  
13 deadline for expert discovery. That's suggested in the  
14 motion at ECF 108 at page 2.

15 Plaintiffs further argue that the subpoena  
16 seeks the relevant documents because the documents  
17 requested are outside the time frame of the relationship  
18 between plaintiff and defendants.

19 In response, defendants point to the Court's  
20 August 2, 2023 order stating that the close of fact  
21 discovery would be August 31, 2023 and note that the  
22 defendants issued the subpoena with a return date of  
23 August 21, 2023 and the defendants explained why the  
24 requested documents are relevant supplemented by Ms.  
25 Fitzgerald's arguments made here today.

Proceedings

1           As a timing matter, I would first note that  
2 plaintiff is incorrect that the Court erred in some  
3 fashion in extending the close of fact discovery. The  
4 Court's extension of the schedule was specific and based  
5 on an expressed request for an extension made by the  
6 plaintiff in document 104. And I quote from ECF 104,  
7 "This letter is written as a follow up to a portion of  
8 the June 7th letter regarding inter alia plaintiff's  
9 request for an extension of time for the completion of  
10 all discovery."

11           One prior request for an extension was made on  
12 December 2, 2022 and was granted. The December 2, 2022  
13 extension was made in the filing made by plaintiff's  
14 counsel docketed at ECF number 78 in which the plaintiffs  
15 requested an extension of fact discovery.

16           I did at one point note on the record while we  
17 were together that I was not extending the fact discovery  
18 schedule in toto at that point in time. But given all of  
19 the events that transpired over the summer and given  
20 plaintiff's request, express request that I extend the  
21 deadline for the close of all discovery, we entered a  
22 responsive scheduling order over defendant's objection.

23           After that time, the parties had ample  
24 opportunity all throughout the summer to certify the  
25 close of fact discovery notwithstanding discreet open

Proceedings

1 issues and continuously declined to do so. Whether or  
2 not the plaintiffs intended to request an extension of  
3 the close of fact discovery in their letter, the Court  
4 nonetheless ordered it on the basis of the fact that  
5 there were so many messy issues that I was aware of that  
6 were percolating over the summer. My order clearly and  
7 unequivocally extended the close of fact discovery to  
8 August 31, 2023. No party objected to it. Had anybody  
9 wanted a clarification, it could have been requested.  
10 Nothing was made in that regard. I do find that the  
11 defendant's subpoena was issued prior to the close of  
12 fact discovery.

13 In addition, I find the defendants have carried  
14 their burden to demonstrate that the requested documents  
15 could bear on their defenses including, but not limited  
16 to, challenging the credibility of an important witness,  
17 specifically Michael Koufakis.

18 Accordingly, plaintiff's motion to quash the  
19 subpoena is denied.

20 The next issue that we had was the defendant's  
21 motion to preclude. And my question to you, Ms.  
22 Fitzgerald, is isn't this really a proper motion for  
23 later on in the case as a motion in limine? Why is this  
24 before me now?

25 MS. FITZGERALD: It's actually the plaintiff's

Proceedings

1 motion and I agree with your Honor.

2 THE COURT: Oh, I'm sorry. I'm sorry. Go  
3 ahead, Mr. Felsen.

4 MR. FELSEN: Your Honor, the problem is is that  
5 there's documents that Ms. Fitzgerald is attempting to  
6 rely on and we're significantly prejudiced because if  
7 they're allowed, we haven't had the opportunity to engage  
8 in discovery on any of this. Ms. Fitzgerald snuck in  
9 four categories of documents with a 6,000 page document  
10 production of documents for the most part where we had  
11 agreed upon during the meet and confer that they would be  
12 produced.

13 So to allow this to go forward without  
14 plaintiffs having the opportunity to engage in further  
15 discovery with respect to these four categories of  
16 documents would be significantly prejudicial to the  
17 plaintiffs.

18 THE COURT: You got them in June, right?

19 MR. FELSEN: June, yeah, we got them in June  
20 and we filed a motion shortly thereafter, after we  
21 believed discovery was over.

22 THE COURT: Your firm is the firm that  
23 requested the extension of the discovery schedule which I  
24 granted unequivocally in plain English on the docket.

25 MR. FELSEN: Your Honor, I respectfully

Proceedings

1 disagree with your interpretation of our letter but I  
2 understand your ruling.

3 THE COURT: You also have to understand the  
4 docket order. It says unequivocally fact discovery is  
5 extended until August 31st. And I don't understand why  
6 that wasn't read literally in black and white, black and  
7 yellow as the case may be.

8 MR. FELSEN: Your Honor, the Court's orders  
9 were making a distinction between fact discovery and all  
10 discovery, and we referred to all discovery in our  
11 letter.

12 THE COURT: Fact discovery shall be completed  
13 by August 31, 2023. It is on the docket. You had a full  
14 month after August 2nd to the close of fact discovery to  
15 conduct any discovery you would have liked to do with  
16 regard to documents you received at the end of June.

17 MR. FELSEN: But that's not what we asked for  
18 in our letter. We asked for an extension on all  
19 discovery, not fact discovery.

20 THE COURT: Fact is encompassed within all  
21 discovery, sir. And I distinguished in my order what was  
22 being extended unequivocally. So I'm failing to  
23 understand how you did not have an opportunity to address  
24 these issues during discovery. You had the documents as  
25 of June 30th, correct?

Proceedings

1 (Pause in proceedings)

2 THE COURT: Mr. Felsen, are you there?

3 MR. FELSEN: I think I was on mute. The prior  
4 orders that the Court issued made a distinction between  
5 fact discovery and all discovery. And so in our letters,  
6 we used the same terminology that the Court was using.  
7 When we referred to all discovery, we were referring to  
8 all discovery which the Court was referring to as expert  
9 discovery.

10 THE COURT: Your letter and what you intended  
11 to request specifically made reference to a prior  
12 extension of fact discovery that was requested in  
13 December. I extended the schedule clearly and  
14 unequivocally again breaking them down by categories.  
15 You didn't read my scheduling order. You didn't  
16 understand my scheduling order. That is frankly not the  
17 Court's responsibility to ensure. It is clear and  
18 unequivocal that fact discovery was extended until August  
19 31st. Did you or did you not receive these documents on  
20 June 30th, sir?

21 MR. FELSEN: We received them on June 30th,  
22 your Honor.

23 THE COURT: Okay. So you had two months from  
24 the extension of the discovery schedule that was  
25 predicated on receipt of your letter during which you



Proceedings

1 could have explored the discovery issues that you think  
2 are necessary to follow up on this production. Whether  
3 you misunderstood because you had a different intention  
4 in writing the letter than what I ultimately ruled  
5 doesn't matter, sir. The discovery schedule was clear.  
6 And your interpretation of my discovery schedule is not  
7 binding on the -- what you intended to request is not  
8 binding on me.

9 MR. FELSEN: Your Honor, we did not have an  
10 opportunity -- if you were to allow these documents to  
11 proceed at trial and wait for a motion in limine, we  
12 would be deprived of the opportunity to do depositions  
13 related to these documents.

14 THE COURT: Did you seek to take any  
15 depositions related to the documents after you received  
16 them in June?

17 MR. FELSEN: Your Honor, discovery was closed  
18 in June. We couldn't do anything.

19 THE COURT: Did you seek to take any discovery  
20 steps with regard to documents after I extended the fact  
21 discovery schedule on August 2nd?

22 MR. FELSEN: We didn't believe that -- we  
23 didn't understand the discovery deadline to be extended.  
24 We thought the expert discovery deadline was extended.  
25 That was the main argument we made with respect to the

Proceedings

1 Withum subpoena. It's not like I'm just making this up,  
2 your Honor. That was our understanding and we identified  
3 that understanding in our motion with respect to the  
4 Withum subpoena on August 21st.

5 THE COURT: We had many, many letters and  
6 correspondence over the summer regarding the pendency of  
7 various fact discovery disputes in this case. And my  
8 order from August 2nd is unequivocal. Plaintiff's letter  
9 motion for extension of time to complete discovery is  
10 granted in part in light of the lengthy history of  
11 discovery disputes in this case. That discovery shall be  
12 completed by August 31, 2023. The parties shall file a  
13 joint status report certifying the close of fact  
14 discovery by September 7, 2023. I don't understand how  
15 anyone could interpret that to mean anything other than  
16 the notion that fact discovery was extended.

17 So did you take any steps in August to do any  
18 work with regard to these documents?

19 MR. FELSEN: No, your Honor. We filed the  
20 letter on August 21st stating that we believe these  
21 documents were produced after the close of discovery.

22 THE COURT: And you knew that defendants  
23 disagreed with you. And if you had reviewed the  
24 scheduling order you would have plainly seen that they  
25 were right.

Proceedings

1 MR. FELSEN: We didn't agree that they were  
2 right, your Honor. That's why we submitted the letter.

3 THE COURT: I'm sorry, there is no credible  
4 interpretation of that scheduling order other than the  
5 notion that fact discovery was extended. You may reserve  
6 your right to seek to preclude any documents later on in  
7 this case, but there's no basis to preclude documents  
8 during the discovery phase based upon the fact that you  
9 did not read my scheduling order.

10 So the motion to preclude the documents that  
11 were produced on June 30, 2023 is denied without  
12 prejudice to raise these issues as a motion in limine at  
13 the appropriate time.

14 If you have a further application with regards  
15 to these issues, you may make it but I don't know what  
16 that would be.

17 So at this point the four issues that were  
18 identified at the outset by the parties as the issues  
19 that remain outstanding have been addressed. Is there  
20 anything further that we should do today, Mr. Felsen?

21 MR. FELSEN: No, your Honor.

22 THE COURT: Ms. Fitzgerald?

23 MS. FITZGERALD: No, your Honor. But I do have  
24 a question. I guess a clarification really. To the  
25 extent that there are issues regarding preclusion of all

Proceedings

1 or part of any expert report, am I correct that we should  
2 be addressing those to the trial judge and not to you at  
3 a later date?

4 THE COURT: Are you anticipating that as a sort  
5 of motion for summary judgment?

6 MS. FITZGERALD: Yes.

7 THE COURT: Then yes, it should be directed to  
8 the district judge.

9 MS. FITZGERALD: Okay. All right. Thank you.

10 THE COURT: And with regard to the expert  
11 schedule, it sounded as though the parties are on track  
12 to complete the expert depositions on Monday. And from  
13 there, what, if anything, remains outstanding with  
14 regards to discovery? Mr. Felsen, starting with you. I  
15 think you're on mute again, sir.

16 MR. FELSEN: Your Honor, just the one issue  
17 with respect to the checklist that you directed us to  
18 meet and confer on.

19 THE COURT: Yes. So that will be part of the  
20 minute entry order. Ms. Fitzgerald, anything else?

21 MS. FITZGERALD: No, your Honor. Thank you.

22 THE COURT: All right. We're almost at the  
23 finish line here with regard to discovery. So I know  
24 this has been a laborious process. I'm glad to hear the  
25 parties are on track to complete the discovery and the

Proceedings

1 expert practice. So I wish you guys a good holiday  
2 season. Take care. And stay safe, everyone.

3 MS. FITZGERALD: Thank you. You too, Judge.

4 THE COURT: Thank you so much.

5 MR. FELSEN: Thank you, your Honor.

6 THE COURT: Take care. Bye-bye.

7 (Matter concluded)

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C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 21st day of December, 2023.

  
\_\_\_\_\_  
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